

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-2677

PETITION OF BIRACH BROADCASTING

OPINION OF THE BOARD

(Opinion Adopted May 2, 2007)

(Effective Date of Opinion: July 11, 2007)

Case No. S-2677 is an application for a special exception pursuant to Section 59-G-2.44 (*Radio and television broadcasting station and towers*) of the Zoning Ordinance to permit four, 410-foot tall radio towers. The Hearing Examiner for Montgomery County held hearings on the application on October 6, 19 and 20, 2006, closed the record in the case on February 23, 2007, and on April 9, 2007 issued a Report and Recommendation for denial of the special exception.

The subject property is identified by Tax Map as FX 23, Parcel P303, and Outlot A, Plat 22772, Winter Hunt Subdivision, located on Bethesda Church Road, Damascus, Maryland, in the RDT Zone.

Decision of the Board: **Special Exception Denied.**

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on May 2, 2007. After careful consideration of the Report and Recommendation, as well as the record in the case, the Board adopts the Hearing Examiner's Report and Recommendation, and finds that the special exception must be denied. The Board adopts the Hearing Examiner's recommendation of denial on the four separate and independently sufficient grounds set forth in the Report and Recommendation.¹

¹ The Board further notes that FCC regulations relating to the transmission of broadcast *signals* are independent of local authority over the placement and construction of broadcast *facilities*. As a matter of law and federal policy, it is well established that local zoning regulations governing the placement, construction and modification of radio broadcast facilities are not preempted by federal statute or regulation. See, e.g., 47 U.S.C. §332(c)(7)(A); *USCOC of Greater Iowa, Inc. v. City of Des Moines*, 465 F.3d 817, 822 (8th Cir, 2006).

Therefore, on a motion by Donna L. Barron, Vice-Chair, seconded by Caryn L. Hines, with Wendell M. Holloway, Catherine G. Titus and Allison Ishihara Fultz, Chair in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that Case No. S-2677, Petition of Birch Broadcasting, is **denied**.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 11th day of July, 2007.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.